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children, and restricting to the surviving parent the right to appoint a testamentary guardian, Domestic Rel. Law, § 51, attempted in express terms to appoint his executors guardians of the property he devised to his minor children, although his wife was still alive. The appointment as such being concededly void because in violation of the statute, the Court of Appeals, E. T. Bartlett and Werner, JJ., dissenting, sustained it as creating a power in trust vesting the executors with authority such as a guardian of the property would have. Since no particular form of words is necessary to create a power in trust, *Blanchard v. Blanchard* (1875) 4 Hun 287; s. c. 70 N. Y. 615; 1 Sugden, Powers, 115, and since "the creation, execution and destruction of powers all depend upon the substantial intention of the parties; and they are construed equitably and liberally in furtherance of that intention," 4 Kent, Com. * 129; *Dorland v. Dorland*, and since in the principal case the latter result was reached, the decision seems sound, unless it violates the policy of the statute. *Prima facie*, it might appear that the legislative intent was to prevent a testator in all cases from depriving his wife of the control and management of her children's property during their minority, but this view is untenable, for the statutes allow the testator to accomplish this very result by the creation of a trust. The principal case, moreover, finds a strong support in the leading case of *Post v. Hover*, supra, where a similar result was reached. It hardly seems as if the doctrine of this case should be overthrown by a statute of such doubtful meaning, taking into account the importance of trust powers at the time the statute was passed. *Grimsley v. Grimsley* (1887) 79 Ga. 397; *Matter of Lichstenstadter* (N. Y. 1886) 5 Dem. 214; contra, *Brigham v. Wheeler* (1844) 8 Met. 127.

THE NATURE OF THE RIGHT TO WHARF OUT INTO NAVIGABLE WATERS.—The New York Court of Appeals in a recent case decided that a littoral owner's right of access comprehends "necessarily and justly, whatever is needed for the complete and innocent enjoyment of that right," and that the erection of a wharf from high water mark out to the line of navigability was thus a legal enjoyment of that right of access, although the fee to the submerged land was not in the littoral owner but in the sovereign. *Trustees of the Town of Brookhaven v. Smith* (1907) 36 N. Y. L. Jour. No. 145. The early case of *Gould v. Hudson River R. R.* (1852) 6 N. Y. 522, declared that a riparian owner on the Hudson River had no private right of access by virtue of his ownership, but had merely the rights of any member of the public in the waters and foreshore. This decision was frequently criticized, *Kane v. N. Y. Elev. R. R.* (1891) 125 N. Y. 164, 184, and was finally overruled, *Rumsey v. N. Y. & N. E. R. R.* (1892) 133 N. Y. 79, and it is now well settled in New York that the riparian owner on navigable waters has a right of access, which right is property and cannot be injured or taken away without compensation. *Saunders v. N. Y. C. & H. R. R. Co.* (1894) 144 N. Y. 75; *Thousand Islands Steamboat Co. v. Visger* (1904) 179 N. Y. 206. The right itself, however, is definitely qualified. It is expressly subject to the public right of navigation and user of the waters and to the right of the sovereign to make improvements for the benefit of navigation and commerce. *Sage v. Mayor* (1897) 154 N. Y. 61; *Rumsey v. N. Y. & N. E. R. R.*, supra;

Saunders v. N. Y. C. & H. R. R. R. Co., supra; and see 11 H. L. R. 344. Hence the decision in the case of *Lansing v. Smith* (1828) 8 Cowen 146 (aside from the question of remoteness of damage, the main ground taken by the court), cannot be said to support the contention that the plaintiff's right of access was taken without compensation, for the erection and location of the dock by the State was in the interest of navigation and commerce, and although the plaintiff's access was partially cut off, he was deprived of no right, his right being subject to this very qualification. There is no difficulty, therefore, in reconciling that case with those in which damages have been given for obstructing a right of access. *Rumsey v. N. Y. & N. E. R. R.* supra; *Saunders v. N. Y. C. & H. R. R. Co.*, supra; *Williams v. Mayor* (1887) 105 N. Y. 419. The English common law recognizes this right, but limits it practically to a mere easement of way, excluding any right to wharf out. *Lyon v. Fishmongers' Co.* (1876) 1 App. Cas. 662; *Buckleuch v. Met. Board of Works* (1872) L. R. 5 H. L. 418; Gould, Waters, 2nd ed., § 167. The court in the principal case, however, declared that law inapplicable to the situation and conditions in New York, and confirmed by its decision the dicta in several previous cases to the effect that, as laid down in *Yates v. Milwaukee* (1870) 10 Wall. 497, 504, among the rights of a "riparian proprietor whose land is bounded by a navigable stream * * * are, access to the navigable part of the river from the front of his lot, the right to make a landing wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public." *Rumsey v. N. Y. & N. E. R. R.*, supra; *Saunders v. N. Y. C. & H. R. R. Co.*, supra. It is important to determine the nature of this right to wharf out.

The courts have solved this problem in various ways. Some hold that the right is a mere license, cf. 1 COLUMBIA LAW REVIEW 549, others that it is part of the right of access, i. e. an incident to the right of ingress and egress, and still others that it is a distinct and independent property right. 4 H. L. R. 14, 21. It has been suggested that the right is of the last class, founded upon an implied grant from the state of the fee to the soil between high water mark and the line of navigability, such grant being "upon condition that the land be used for no other purposes than those of the commerce marine." 4 H. L. R., supra. While this theory is not illogical, it is supported by only a few cases, some of which involved statutes giving riparian owners a more or less exclusive right to make improvements into the waters in front of their land. *Goodsell v. Lawson* (1875) 42 Md. 348, 366; *Norfolk City v. Cooke* (Va. 1876) 27 Gratt. 430, erroneously citing *Yates v. Milwaukee*, supra, for its position. It seems reasonable to consider the right to wharf out an "independent property right" and not a mere incident to the right of ingress and egress, but the fact of an exclusive right of user in portions of the soil affords no stronger argument in favor of a grant of a fee than of an easement. Analogous rights of user are often construed to be an easement. Washburn, Easements and Servitudes, 150, 163; *McCutchen v. Ry. Co.* (La. 1907) 43 So. 42; and see *Att'y Gen'l. v. Wright* [1897] 2 Q. B. 318. Important results flow from the determination of this question.

If the littoral owner has the fee he can alienate it apart from his upland, while if he has merely an easement he can not, for it is appurtenant to his upland. The right to wharf out has been exercised from early times in many of the states, *Dutton v. Strong* (1861) 1 Black 23, 32, and, doubtless, almost invariably in connection with the sight of ingress and egress. It has usually been either identified with that right or grouped with it, *Dutton v. Strong*, supra; *Yates v. Milwaukee*, supra; *R. R. Co. v. Schurmier* (1868) 7 Wall 272, 289, and although the two rights involve different modes of user, they are regarded as depending upon the same fact, viz., littoral or riparian ownership. It would seem that this right was recognized for the benefit of riparian ownership, and, as laid down in the principal case, for the more complete enjoyment of the right of ingress and egress, and to allow its alienation apart from the upland would defeat the very purpose for which the right was originally recognized and would seem of doubtful policy for economic reasons. Moreover, it is more natural to consider this right as an easement and thus analogous in its nature to the allied right of ingress and egress, than as a conditional fee.

THE LEGAL CHARACTER OF RIGHTS UNDER "GOVERNMENTAL LICENSES."—A franchise was first conceived of as "a branch of the king's prerogative" which had been granted to a subject, 2 Bl. Com. *37, and as such was held to be an incorporeal hereditament. 2 Bl. Com. *21; *Regina v. Cambrian R. R. Co.* (1871) L. R. 6 Q. B. 422. In the United States, the conception of a franchise has changed from that of a granted sovereign prerogative to that of the subject of a contract between the state and a person or persons, *Pierce v. Emery* (1856) 32 N. H. 484; 4 Thompson, Corporations, § 5335; 2 Spelling, Priv. Corp. § 1054; see *Rex v. Pasmore* (1789) 3 T. R. 199, 246, whereby for valuable consideration permission is given to do something in which the public as a whole is interested, *Pierce v. Emery*, supra; *Century Transfer Co. v. Pullman Co.* (1890) 139 U. S. 24, and which one could not do as of common right, *Abbott v. Smelting Co.* (1876) 4 Neb. 416; *Chicago R. R. v. Dunbar* (1880) 95 Ill. 571, under the common law. *Spring etc. Co. v. Schottler* (1882) 62 Cal. 69; *Bank of Augusta v. Earle* (1839) 13 Pet. 519, 595. The franchise still retains its character of property, *Wilmington R. R. v. Reid* (1871) 13 Wall. 264; *People v. O'Brien* (1888) 111 N. Y. 1, 40, while gaining further protection from the constitutional provision as to the inviolability of contracts. *Oliver v. Memphis R. R.* (1875) 30 Ark. 128; *Wilmington R. R. v. Reid*, supra. The governmental authorization need not be in terms of a contract, but the other characteristics being present, the authorization will be interpreted as a contract as of course; *People v. O'Brien*, supra; see *City of Bridgeport v. N. Y. & N. H. R. R.* (1869) 36 Conn. 255, 264; and although franchises are generally exercised by corporations they are not necessarily. *Memphis R. R. v. Berry* (1884) 112 U. S. 609; *Brady v. Moulton* (1895) 61 Minn. 185; 4 Thompson, Corp. § 5335. "Franchise" is also used in another and special sense, namely, the franchise of incorporation, but this franchise is also conceived of as the subject of a contract, having the qualities enumerated above. *Dartmouth College v. Woodward* (1819) 4 Wheat. 518; Freund, Police Power, § 361.